

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 12, 2006

JERMAINE IVORY v. STATE OF TENNESSEE, RICKY BELL, WARDEN

Appeal from the Criminal Court for Davidson County
No. 98D-2781 Mark J. Fishburn, Judge

No. M2006-01040-CCA-R3-HC - Filed February 26, 2007

The petitioner, Jermaine Ivory, appeals the Davidson County Criminal Court's denial of his petition for habeas corpus relief. The trial court found that the petition failed to establish that the petitioner was entitled to habeas corpus relief. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN GLENN, JJ., joined.

Jermaine A. Ivory, Whiteville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia Lee, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; Kathy Morante, Assistant District Attorney General, for appellee, State of Tennessee.

OPINION

In April 2000, the petitioner was convicted by a Davidson County jury of three charges involving the sale of cocaine and received an effective sentence of thirty-six years, as a Range II, multiple offender. This court affirmed the petitioner's convictions and sentence. State v. James Lee Ivory and Jermaine Antonio Ivory, No. M2000-02145-CCA-R3-CD, 2003 WL 76980 (Tenn. Crim. App. Jan. 10, 2003). The petitioner then filed an unsuccessful petition for post-conviction relief alleging ineffective assistance of counsel. This court affirmed the trial court's denial of the post-conviction petition. Jermaine Ivory and James Ivory v. State, No. M2003-02553-CCA-R3-PC, 2004 WL 2827006 (Tenn. Crim. App. Dec. 9, 2004), perm. to appeal denied (Tenn. May 9, 2005). On November 22, 2005, the petitioner filed a petition for writ of habeas corpus in the Davidson County Criminal Court. The petition makes various allegations relative to the sufficiency of proof to support the convictions, double jeopardy violations, ineffective assistance of counsel and witness perjury.

In denying the petition, the trial court found that the petitioner's convictions were neither void nor had his sentences expired.

ANALYSIS

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas relief is limited and available only when it appears on the face of the judgment or the record of proceedings upon which the judgment is rendered that a trial court was without jurisdiction to convict the petitioner or that the petitioner's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). To prevail on a petition for writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. See State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109.

Initially, we note two procedural problems with the petition that would have justified summary dismissal by the trial court. First, the petition was filed in Davidson County, the county of conviction, and not Hardeman County, the county where the petitioner is presently incarcerated. Pursuant to Tennessee Code Annotated Section 29-21-105, a petitioner seeking habeas corpus relief should file the petition in the county “most convenient in point of distance” to the petitioner and, if not, state sufficient reason why the petition was not so filed. Failure to file a petition for writ of habeas corpus in the petitioner's county of incarceration, absent sufficient reason for not doing so, is a proper basis for dismissal of the petition. See, e.g., Torris Benson v. Glen Turner, Warden, No. E2005-00409-CCA-R3-HC, 2005 WL 2978963, at *2 (Tenn. Crim. App. Nov. 7, 2005), perm. to appeal denied (Tenn. Feb. 21, 2006). Secondly, as asserted by the state, the petitioner failed to provide copies of the attacked judgment with his petition as mandated by Tennessee Code Annotated Section 29-21-107(b)(2). Likewise, this failure to comply with the statutory requirements of habeas corpus procedure would warrant a summary dismissal of the petition. Archer, 851 S.W.2d at 165; Hickman v. State, 153 S.W.3d 16, 21 (Tenn. 2004).

We also find that the petition contains allegations that were previously litigated on direct appeal and post-conviction. On direct appeal, the petitioner raised issues regarding the sufficiency of the evidence to support his convictions. At post-conviction, the petitioner challenged his conviction on the basis of ineffective assistance of counsel. A petitioner may not use habeas proceedings as a means to raise and relitigate issues previously ruled upon. Gant v. State, 507 S.W.2d 133, 137 (Tenn. Crim. App. 1973), cert. denied (Tenn. 1974).

Furthermore, it is clear that the petition fails to allege any errors that would result in the granting of a writ for habeas corpus relief. As stated previously by this court:

If the court rendering a judgment has jurisdiction of the person, the subject-matter, and has the authority to make the challenged judgment, the judgment is voidable, not void; and the challenged judgment may not be collaterally attacked in a suit for habeas corpus relief.

Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994). None of the allegations contained in the petition, if proven, would render the judgments of conviction void. Gant, 507 S.W.2d at 136-137 (sufficiency of the evidence and witness credibility not proper subjects for habeas relief); Passarella, 891 S.W.2d at 627 (ineffective assistance of counsel allegation not proper subject of habeas proceeding); Timothy Hickman v. Howard Carlton, Warden, No. E2006-00860-CCA-R3-HC, 2006 WL 2567511, at *2 (Tenn. Crim. App. Sept. 7, 2006) (double jeopardy allegation not proper subject of habeas proceeding). For all of these reasons, we find that the trial court's dismissal of the petition for writ of habeas corpus was proper.

CONCLUSION

Based upon the foregoing and after full consideration of the record, arguments of counsel and applicable law, this court concludes that the petitioner has failed to establish that he is entitled to habeas corpus relief. The judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE